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**LEGAL ASPECTS OF AIDS FROM A
COMPARATIVE PERSPECTIVE:
AN AFRICAN STUDY**

INTENSIVE COURSE

Distinguished Visiting Profess Charles Ngwena

Fall 2005

**Faculty of Law
University of Toronto**

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OUTLINE OF THE INTENSIVE COURSE AT THE FACULTY OF LAW, UNIVERSITY OF TORONTO: HIV/AIDS: AN AFRICAN CASE STUDY

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1 Introduction

The course is a contribution towards the understanding and application of comparative human rights dimensions to the AIDS pandemic. It will focus on the human rights aspects of the pandemic as they impact on Africa, but with a particular reference to South Africa. Sub-Saharan Africa carries a disproportionate burden of the epidemic. Its socio-economic fabric has thus far not stood up to the challenges of AIDS. Likewise, Africa's legal responses to the epidemic have been slow to ensure effective realization of human rights. The inadequacies of Africa's responses have been in part on account of meager resources, and in part on account of insufficient internalization of a culture of human rights. South Africa, however, is providing leadership in the domestication of human rights in the sphere of AIDS, not least on account of a liberal constitution and the interpretation thereof by the Constitutional Court, as well as constitutional provisions that seek to bridge the traditional dichotomy between civil and political rights and socio-economic rights. Policy responses, however, on the part of the state and organs of the state have not always been progressive.

The lectures are organised around 7 main topics, namely:

- HIV/AIDS: Demographic profile, social dynamics and policy responses in South Africa
- Equality and human dignity as foundational values under the Constitution
- HIV testing and the health sector
- HIV/AIDS and the workplace
- HIV/AIDS and the education sector
- Access to treatment
- Criminalising HIV transmission

As alluded to the lectures are built around South Africa. However, from time to time, references will be made to other African countries and African human rights systems, including the African Charter on Human and People's Rights.

It is surmised that each topic will take two hours to deliver. However, there might be an element of cross-subsidy between topics.

For each topic, there are aims and objectives and pre-reading. **Reading has been supplied.** Further reading will be supplied following the completion of each topic for the purposes of facilitating

2 Topics

2.1 Topic One: HIV/AIDS: The demographic profile, social dynamics and policy framework

Aims and objectives:

- to explore the prevalence and incidence of HIV/AIDS in South Africa
- to understand the factors that fuel and sustain the high prevalence of HIV
- to critically appraise the South African responses to the AIDS pandemic

Reading:

Van Rensburg et al *Strengthening local government and civic responses to the HIV/AIDS epidemic in South Africa Bloemfontein*: Centre for Health Systems Research & Development: pp 19-75.

2.2 Topic Two: Equality and human dignity as foundational values under the South African Constitution

Aims and objectives:

- To understand the nature and place of equality and human dignity under the South African Constitution
- To understand the test for unfair discrimination under the South African Constitution
- To apply the notions of equality and human dignity and the test for unfair discrimination to HIV/AIDS

Reading:

1. Chapters 1 and 2 of the Constitution of the Republic of South Africa. Focus on sections 1, 2, 7-10, 26, 27, 29 & 36.
2. *Harksen v Lane* 1997 (11) BCLR 1489 (CC). Focus on the judgment of Goldstone J.
3. *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC). Focus on the judgment of Langa J
4. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice* 1998 (12) BCLR 1517 (CC). Focus on the judgment of Ackerman J

2.3 Topic Three: HIV/AIDS and the workplace

Aims and objectives:

- to apply constitutional rights equality and human dignity to discrimination in the workplace
- to apply constitutional privacy to HIV testing in the workplace workplace
- to generally understand the intersection between HIV/AIDS and the Employment Equity Act of 1998

Reading:

1. Constitution of the Republic of South Africa, sections 9, 10, 12, 22, 23 & 36.
2. Employment Equity Act of 1998, sections 1-15
3. Code of Good Practice on Key Aspects of HIV/AIDS and Employment (2000)
4. *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC)
5. *Joy Mining Machinery v NUMSA & Others* [2002] 4 BLLR 372 (LC)
6. *PFG Building Glass (Pty) Ltd v CEPPAWU & Others* [2003] 5 BLLR 475 (LC)

2.4 Topic 4: HIV/AIDS, privacy and confidentiality and the health care sector

Aims and objectives:

- understand the professional guidelines on the management of privacy and confidentiality
- to apply the constitutional right to privacy to the health sector
- to examine the intersection between HIV testing and informed consent

Reading:

1. Constitution of the Republic of South Africa, sections 12, 14 & 36.
2. *Jansen van Vuuren and Another v Kruger* 1993 (4) SA 842 (T)
3. *C v Minister of Correctional Services* 1996 (4) SA 292 (T)
4. *Castell v De Greef* 1994 (4) SA 408 (C)
5. Health Professions Council of South Africa *The Management of Patients with HIV Infection or AIDS* (2001)

2.5 Topic Five: HIV/AIDS and the education sector

Aims and objectives:

- to apply constitutional rights to equality and human dignity to discrimination in the schools and colleges
- to apply constitutional privacy to HIV testing in schools and colleges
- to apply the constitutional right to education in schools and colleges
- to understand the intersection between HIV/AIDS and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

Reading:

1. Constitution of the Republic of South Africa, sections 7, 9, 10, 11, 12, 15, 24, 29, 31 & 36.
2. National Policy on HIV/AIDS for Learners and Educators issued in terms of section 3(4) of the National Education Policy Act 27 of 1996.
3. SA Law Commission *HIV/AIDS and discrimination in schools* (1998) Read the executive summary only
4. Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

2.6 Topic Six: HIV/AIDS and access to treatment

Aims and objectives

- To understand the nature of rights concerning health under the South African Constitution
- To apply the rights concerning health to HIV/AIDS

Reading:

1. Constitution of the Republic of South Africa, sections 7, 8, 10, 11, 27, 28, 35(2)(e) & 36
2. *Soobramoney v Minister of Health KwaZulu Natal* 1997 (12) 1696 (CC)
3. *Van Biljoen v Minister of Correctional Services* 1997 (6) BCLR 789 (C)
4. *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC)
5. *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC)

2.7 Topic Seven: Criminalising HIV transmission

Aims and objectives

- to examine the case for compulsory testing of persons arrested in sexual offences cases
- to examine the case of statutory regulation of criminal liability relating to transmission of HIV/AIDS
- to critically appraise the recommendation of the South African Law Commission in respect of the preceding aims and objectives

Reading:

1. South African Law Commission. *Compulsory HIV testing of persons arrested in sexual offences* (2000). Read executive summary only
2. South African Law Commission. *The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour* (2001). Read entire report

